

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

PRESTON EMERSON,

Case No. 2:21-cv-01215-GMN-NJK

Petitioner,

v.

**ORDER**

WILLIAM HUTCHINGS, et al.,

Respondents.

This habeas matter is before the Court on Petitioner Preston Emerson's Motion for Leave to File Second Amended Petition (ECF No. 13).<sup>1</sup>

On September 1, 2021, the Court provisionally appointed the Federal Public Defender and granted Emerson 60 days to file an amended petition. ECF No. 6. On October 25, 2021, Emerson filed his first amended petition for writ of habeas corpus. ECF No. 11. Emerson represented that upon initial review of the state court proceedings, counsel preliminarily calculated that the statute of limitations was likely set to expire on October 25, 2021, and filed the first amended petition as a protective petition. ECF No. 13 at 2. Emerson did not attach a proposed second amended petition and seeks permission to file a second amended petition after counsel has had a full opportunity to conduct additional research and investigation, review the record, and prepare an amended petition. *Id.* at 3.

Under Federal Rule of Civil Procedure 15(a)(2), leave to amend should be freely given "when justice so requires." But leave to amend "is not to be granted automatically," and the court "considers the following five factors to assess whether to grant leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013) (internal punctuation omitted). The Court finds that none

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<sup>1</sup> Respondents filed a Non-Opposition (ECF No. 14) to Emerson's Motion.

1 of the factors above weighs against allowing the amendment sought here, especially as  
2 Respondents do not oppose Emerson's motion. Accordingly, pursuant to Rule 15(a)(2) of  
3 the Federal Rules of Civil Procedure, the Court finds that leave to amend is appropriate. The Court  
4 sets forth a revised briefing schedule below.

5 **IT IS THEREFORE ORDERED:**

- 6 1. Petitioner Preston Emerson's Motion for Leave to File Second Amended Petition (ECF  
7 No. 13) is GRANTED.
- 8 2. Respondents are not required to respond to the first amended petition for writ of habeas  
9 corpus (ECF No. 11).
- 10 3. Petitioner Emerson will have until February 22, 2022 to file a second amended petition  
11 for writ of habeas corpus. Petitioner at all times remains responsible for calculating  
12 the running of the federal limitation period and timely presenting claims. That is, by  
13 setting a deadline to amend the petition and/or by granting any extension thereof, the  
14 Court makes no finding or representation that the petition, any amendments thereto,  
15 and/or any claims contained therein are not subject to dismissal as untimely. *See Sossa*  
16 *v. Diaz*, 729 F.3d 1225, 1235 (9th Cir. 2013).
- 17 4. Respondents will have 60 days from the date on which the second amended petition is  
18 served upon them to answer or otherwise respond to the petition. If Respondents file  
19 an answer, Petitioner will have 30 days to file a reply to the answer. If any motion is  
20 filed, the parties will brief the motion in accordance with LR 7- 2 and 7-3 of the Local  
21 Rules of Practice.
- 22 5. Any procedural defenses raised by Respondents in this case must be raised together in  
23 a single consolidated motion to dismiss. Respondents may not file a response in this  
24 case that consolidates their procedural defenses, if any, with their response on the  
25 merits, except pursuant to 28 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly  
26 lacking merit. If Respondents do seek dismissal of unexhausted claims under §  
27 2254(b)(2): (a) they must do so within the single motion to dismiss not in the answer;  
28 and (b) they will specifically direct their argument to the standard for dismissal under

DATED: November 19, 2021

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